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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**SAN FRANCISCO DIVISION**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

JOHN V. BIVONA; SADDLE RIVER ADVISORS, LLC; SRA MANAGEMENT ASSOCIATES, LLC; FRANK GREGORY MAZZOLA,

Defendants, and

SRA I LLC; SRA II LLC; SRA III LLC; FELIX INVESTMENTS, LLC; MICHELE J. MAZZOLA; ANNE BIVONA; CLEAR SAILING GROUP IV LLC; CLEAR SAILING GROUP V LLC,

Relief Defendants.

Case No. 3:16-cv-01386-EMC

**SUPPLEMENT TO MOTION BY RECEIVER KATHY BAZOIAN PHELPS FOR INSTRUCTIONS RE TAX MATTERS RE DISTRIBUTION PLAN**

Hearing Date: January 16, 2020
Time: 1:30 p.m.
Location: Courtroom 5, 17th Floor
450 Golden Gate Ave.
San Francisco, CA 94102

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## Statutes and Rules

**Regulations**

Kathy Bazoian Phelps, the successor receiver herein (the "Receiver"), hereby files this Supplement to her original Motion to (1) Employ Miller Kaplan as Tax Advisors; (2) Employ Schinner & Shain as Securities Counsel; and (3) for Instructions that was heard on October 10, 2019 [Doc No. 516]. The Receiver has conferred with counsel for the Securities and Exchange Commission, counsel for Progresso Ventures LLP, and counsel for the SRA Investor Group[1] regarding the substance of the within Supplement.

## I. INTRODUCTION

Prior to the Receiver's appointment, the Investor Group promoted a distribution plan that contemplated returning shares to investors, which was in opposition to the former receiver's and the SEC's proposed plan to liquidate the assets of the estate and make *pro rata* distributions to investors and creditors. Neither of the competing plans addressed the tax consequences of sale or distribution of shares.

The Investor Group's plan also did not consider the logistical challenges raised by the uneven timing of stock distributions or sales as liquidity events occur and how an equitable result could be achieved for both investors and creditors. The Investor Group's plan was also based on inaccurate data regarding the number of shares owned relative to the number of shares claimed. The share surpluses that the Investor Group's plan relied upon to supposedly fund payments for administrative and unsecured creditors do not actually exist. These unresolved issues still linger today and create challenges in implementing a distribution plan that partially sells and partially distributes shares, with cash going to creditors and shares going to investors, to the extent shares remain after the sale to provide necessary cash to fund the plan.

Upon the Receiver's appointment, the Court requested that the Receiver provide comments regarding the competing plans but required her to adopt the Investor Group's proposal that investors receive shares and unsecured creditors get cash. Although not in line with what the

[1] The Receiver has requested that counsel for the Investor Group identify the investors who comprise the Investor Group because the Receiver has become aware that some investors have left the Investor Group and she is unable to gauge the relative size of the group. Counsel for the Investor Group has declined to provide the identity and number of investors in the Investor Group.

Receiver thought would be the most efficient or cost-effective plan, the Receiver accordingly proposed a Distribution Plan to meet the Court's prescribed criteria (the "Receiver's Plan").

The Investor Group requested a tax opinion regarding the tax treatment of the sales of shares and distributions proposed in the Receiver's Plan. The Receiver's Plan adheres to the Court's Order commencing the Receivership in which a qualified settlement fund was created. Additionally, the Investor Group asked the Receiver to explore alternative scenarios for the sale and distribution of shares that might mitigate tax liability for the estate and therefore increase the amount ultimately available for distribution to investors and creditors. Therefore, the Receiver had to engage both tax and securities counsel to advise her. The Investor Group submitted a report (the "Burack Report) by their expert, Scott Burack [Doc No. 519-1], in response to the Receiver's request for instructions on tax issues, and the Receiver's tax and securities advisors have specifically considered the issues raised in the Burack Report.

This Supplement has been prepared to advise the Court, the Investor Group, and other interested parties of the basis for the Receiver's opinion and recommendations regarding the distribution plan, as set forth herein. The Receiver's opinions and recommendations take into account applicable tax and securities laws and regulations.[2]

The Receiver and her professionals are unable to arrive at a satisfactory outcome as desired by the Investor Group that eliminates or significantly mitigates tax liability for the estate without other significant costs and delays, and with no certainty regarding the outcome. Additionally, given the current state of the case, its complexity, and the projected future administrative costs, the Receiver feels obligated to advise the Court of a streamlined, alternative distribution plan, which is set forth as No. 3 below.

In summary and generally speaking, the three main possible paths to distribution to the

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[2] In addition to other practical and legal considerations, this Supplement addresses applicable tax and securities authority addressing the issues raised by the Investor Group upon which the Receiver's conclusions and recommendations are based. The Receiver has not presented confidential attorney-client privileged communications and does not intend to do so by presenting the legal arguments set forth herein.

defrauded victims and creditors are as follows:

1. The Court could adopt the Receiver's Plan, as modified at the hearing on October 10, 2019, a copy of which is attached hereto as Exhibit "1," with minor additional changes the Receiver would make to finalize the Plan. The Receiver's Plan as modified is founded on all assets – cash, publicly traded stock, pre-IPO shares, and interests in forward contracts – being part of the Qualified Settlement Fund ("QSF") upon creation of the receivership by the October 11, 2016 Order. An IRS Ruling will be required if any effort is made to deem the assets to be outside of the QSF.

2. The Court could authorize the Receiver to create a special purpose entity ("SPE") to which some or all the shares to be returned to investors could be transferred from the receivership QSF to be held pending transfer to the investors (the "SPE Approach"). An analysis of the costs, risks, and procedural hurdles of this approach is set forth below. This approach would require an IRS Ruling and No-Action letter from the SEC to ensure compliance with tax and securities laws, and in some instances potentially issuer consent to transfer illiquid shares, which will create significant cost and delay in these proceedings. Notably, the IRS could also choose not to issue a ruling after the estate incurs the delay and costs of pursuing the SPE Approach.

3. The Court could authorize a streamlined liquidation plan as an alternative approach. All of the shares would be liquidated upon liquidity events and the expiration of all lockup periods, and funds would be distributed *pro rata* on an interim and final basis as the shares can be sold (the "Liquidation Approach"). This would result in the fasted and most cost-effective outcome for all parties, would not require an IRS Ruling or SEC approval, and can be implemented immediately. The Receiver is sensitive to the opposition of the Investor Group, and to the support of the SEC, for this approach, and is also mindful of the Court's prior rulings. However, the Receiver also notes that the Investor Group's plan did not contain accurate data regarding surplus shares, it did not contemplate tax consequences, and it did not provide for an

equitable solution as to how to liquidate and distribute shares. The tax and securities issues cause the Receiver to be concerned about the costs and delays associated with both the pending Receiver's Plan and the SPE Approach. The Receiver has not detailed how the Liquidation Approach might work in this pleading given the Court's prior directive but would do so in supplemental pleadings based on the outcome of the next hearing.

In addition to asking that the Court direct the Receiver on which of the above three options to implement, the Receiver also requests the following relief:

1. Permission to file QSF tax returns for the stub period of the receivership in 2016 and for the years 2017 and 2018 (and each year going forward); and to pay any tax, interest or penalties that might be associated with those filings from receivership assets.

2. An order authorizing her to obtain valuations of the assets of the receivership as of October 11, 2016. The Receiver contemplates filing an administrative motion seeking approval for her engagement of a valuation firm if the Court grants this relief.

## II. STATEMENT OF FACTS

1. The Receiver proposed a Distribution Plan pursuant to the Court's instructions based upon rulings in this case prior to the Receiver's appointment and the SRA Investor Group's proposed plan of giving shares to investors and selling supposed stock surpluses to pay unsecured creditors.

2. The Receiver's Plan accordingly contemplates some securities will be sold to pay administrative claims, taxes and unsecured creditor claims. The Plan also addresses, however, the tax consequences of the sale and distribution issues, as well as providing an updated inventory of securities and information on the absence of the anticipated stock surpluses. The Receiver's Plan assumes that all of the securities that will be sold under the proposed Receiver's Plan are part of a QSF established when the receivership was formed on October 11, 2016 and, as such, their sale may generate tax liability, depending on the losses generated within the QSF. The distribution of shares to investors may similarly generate tax liability pursuant to the QSF tax regulations.

3. The Investor Group initially requested a tax opinion relating to the position in the Receiver's Plan that all of the assets are part of a QSF, and the sale or distribution of those assets is to be taxed accordingly. The Investor Group subsequently requested that the Receiver consider alternative tax planning mechanisms to seek to mitigate tax liability of the estate.

4. The Receiver has evaluated applicable tax and other legal authority as requested by the Investor Group. Her conclusions regarding the tax implications of the Receiver's Plan remain unchanged. The current version of the Receiver's Plan, attached hereto as Exhibit "1," provides for the following tax treatment:

a. The Receivership Estate is treated as a Qualified Settlement Fund ("QSF") effective as of the date of the commencement of the Receivership Estate, October 11, 2016.

b. The assets of the Receivership Entities became property of the QSF as of October 11, 2016.

c. In order to establish the tax basis in the assets of the QSF, the Receiver will need to obtain a valuation of the assets of the Receivership Entities as of October 11, 2016.

d. The sale of securities within the QSF and the distribution of securities from the QSF are both events that may generate tax at the QSF level.

e. The QSF will report as a capital gain the difference between the value of the shares as of the commencement of the receivership and the value on date of sale or distribution. This gain will be offset by available capital losses. If there is net capital gain, the gain will be included in the QSF's income, as QSF's do not enjoy a preferential rate of tax on capital gains. The QSF's income will be offset by its expenses. The QSF's income after expenses will be taxed at an approximate rate of 43% (Federal and California).

f. The amount of capital losses and expenses and their impact on tax liability is presently unknowable.

g. Any tax liability of the estate will have to be paid through the sale of securities to generate sufficient cash to pay such tax liability. Those sales will also potentially generate tax liability, making the calculation of the amount of shares to sell more complicated.

h. The Receiver will be unable to make distributions to creditors or investors until such time as the Receiver determines that enough funds are available to pay all tax, interest and penalties in full.

5. Additionally, the Receiver has reviewed other possible strategies to try to mitigate tax liability for the receivership estate, including the formation of an SPE and the transfer of some or all of the assets to a pass-through entity. As set forth herein, no other strategy appears viable or cost-effective under the facts of this case.

6. The Receiver does not believe it is appropriate to modify the tax approach set forth in the Receiver's Plan, which tax approach would be the same if the Liquidation Approach to distribution is adopted. The Receiver does not intend to pursue another tax approach unless instructed to by the Court, and only upon receipt of a favorable IRS Ruling and, if recommended by her securities counsel, a No-Action letter from the SEC.

7. The Receiver has also evaluated the applicable securities laws and regulations implicated by the Receiver's Plan and the possible alternative strategies for distribution of the shares. The Receiver has concluded that, with appropriate action, the sale and distribution of shares can be done in compliance with the securities regulations. Since both the Pre-IPO Shares and the IPO Shares held by the Receiver were never registered for offer or sale, with the assistance of her securities counsel, the Receiver can sell or distribute the securities without registration under Section 5 of the Securities Act of 1933, as amended (the "Securities Act"), based on applicable exemptions. The Receiver has not included a detailed analysis of this issue in these papers as it is extraneous to the underlying tax questions presented by the Investor Group.

8. The Receiver has also consulted with her securities counsel regarding the Investor Group's suggestion that an SPE be formed to try to mitigate tax liability. The securities issues that arise from the SPE Approach are addressed below, along with other legal, regulatory and

procedural issues that, if not totally insurmountable, will require a No-Action letter from the SEC before the Receiver could consider this approach.

## III. ANALYSIS OF THE TAX CONSEQUENCES OF SALE AND DISTRIBUTION OF SHARES

Whether the Receiver's Plan is adopted or the Liquidation Approach is adopted, the Receiver believes that all of the assets are property of the QSF and when sold or distributed will be subject to the applicable United States Treasury Regulations. Since many of the already publicly traded stocks are currently in a loss position, it is not clear whether there will even be significant tax liability, but the Receiver has to anticipate the risk of some tax liability. In response to the Investor Group's request for a detailed analysis on whether a QSF exists and whether there is a way to prevent some assets from becoming part of the QSF, or to remove them from the QSF, the Receiver provides the following analysis.

### A. A QSF Arose as a Matter of Law upon Creation of Receivership

A QSF was formed upon the creation of the receivership and arose as a matter of law on October 11, 2016, the date the court entered a Temporary Restraining Order and Order to Show Cause (the "TRO"). This conclusion is supported by the language of the TRO, facts of this case and by the published authority. The facts of this case meet the three-prong test required to establish a QSF.

A QSF arises as matter of law once the three-prong test of Reg. §1.468B-2(k)(2) is met. This is well established law, supported by case law, IRS rulings and other guidance.[3] The IRS

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[3] The law regarding the creation and administration of a QSF is well established. The Preamble to the Final Internal Revenue Code ("IRC") section 468B(g) Regulations provide as follows:

> Section 468B(g) was enacted, in part, to reverse the finding in Rev. Rul. 71-119, 1971-1 C.B. 163. See section 601.601(d)(2)(ii)(b) of this Chapter. (Some taxpayers argued that Rev. Rul. 71-119 was authority for avoiding the current taxation of income earned on the assets of an escrow account, settlement fund, or other similar fund.) See H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-845 n. 2 (1986). In accordance with section 468B(g), Rev. Rul. 92-51, 1992-27 I.R.B. 9, obsoletes Rev. Rul. 71-119 (and modifies or obsoletes related revenue rulings) for funds established after August 16, 1986. ***Accordingly, no authority exists for the position that the income of an escrow account, settlement fund, or other similar fund is not subject to***

Chief Counsel pronouncements and the legislative history of IRC §468B(g) support the idea that Congress intended, and the IRS embraced, a policy resolving uncertainty regarding funds of money established to resolve claims.

Once a QSF is established, the QSF remains in existence until the earlier of the date it:

(1) No longer satisfies the three-prong test under Reg. § 1.468B-1; or
(2) No longer holds assets and will not receive further transfers.

*See* PLRs 200452026 and 200821019.

In *United States v. Brown*, 348 F.3d 1200 (10th Cir. 2003), managers of various controlled businesses engaged in a fraudulent scheme to sell U.S. securities to German investors. The defendants settled with the U.S. by placing certain property (including proceeds from the fraudulent securities sales) into a fund managed by a receiver. The fund accumulated significant assets, the income from which the IRS claimed was subject to income tax. The receiver claimed that the fund should not be taxed as a QSF and argued that the estate's assets should be treated as if owned by the claimants to whom those assets would have ultimately been distributed.

The *Brown* court held that a receivership estate established to compensate victims of securities fraud that is like a Title 11 case qualifies as a QSF. The receivership estate is a QSF because (1) the receivership estate was established by a court order; (2) the purpose of the receivership estate is to pay claims arising out of fraudulent transactions in violation of the securities laws; and (3) the receivership estate's assets are segregated from the assets of all other persons.[4]

The IRS has embraced the holding in the *Brown* decision and has incorporated it into the standard IRS procedure for proofs of claim filed by receivers. Following the publication of *United*

(continued)

***current taxation.*** (Emphasis added).

4 Internal Revenue Code ("IRC") § 468B(g) provides that "[n]othing in any provision of law shall be construed as providing that an escrow account, settlement fund, or similar fund is not subject to current income tax."

*States v. Brown*, the IRS added a proviso to proofs of claim filed in receivership cases. This proviso imposes a clear requirement on receivers seeking the relief of a proof of claim. The proviso requires receivers to demonstrate compliance with the tax filing obligations of a QSF regarding receivership property and income. The IRS position is unequivocal: "…the Internal Revenue Service asserts that the receivership has an obligation to file Forms 1120-SF, U.S. Income Tax Return for Settlement Funds (Under Section 468B)…"[5]

The Investor Group has previously raised the question of whether assets which may have been a part of a QSF could be removed or re-titled as assets of a different entity. The IRS Chief Counsel concluded in CCA 200113025, that seized assets of securities promoters who were under criminal indictment for securities violations and were also being civilly sued by the investors constituted a QSF while held by the office that indicted the promoters and by a receiver appointed by the court. In CCA 200113025, the Chief Counsel also concluded that pursuant to § 1.468B-1(b), classification as a QSF precludes treatment of the fund as a trust or other type of entity.

The primary authority on the creation of a QSF are the Regulations promulgated by the Treasury Department following the enactment of IRC §468B(g). It is upon the Regulations that PLR 200435007, the *Brown* holding and CCA 200113025 are based.[6]

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[5] In addition to the liquidated claim amount listed above [i.e., typically an amount related to pre-receivership conduct by the taxpayer], the Internal Revenue Service asserts that the receivership has an obligation to file Forms 1120-SF, U.S. Income Tax Return for Settlement Funds (Under Section 468B) . . .. After the receiver has filed returns for the receivership estate, the Internal Revenue Service will have those returns reviewed and/or audited and will amend this claim accordingly. The Internal Revenue Service notes that any failure by the receiver to fulfill his duties and provide for appropriate Federal taxes can result in personal liability of the receiver for the tax obligations of the receivership pursuant to 31 U.S.C. 3713(b).

[6] Reg. § 1.468B-1(a) provides that a QSF is a fund, account, or trust that satisfies the requirements of Reg. § 1.468B-1(c). Here the QSF is a fund of money and Property established by the TRO.

Reg. § 1.468B-1(c), (c)(1)-(3) sets forth the three (3) requirements that must be satisfied to establish a QSF as follows with emphasis relevant to the facts of the TRO:

> (1) It is established pursuant to an order of, or is approved by, the United States, any state (including the District of Columbia), territory, possession, or political subdivision thereof, or any agency or instrumentality (including a court of law) of any of the foregoing and is subject to the continuing jurisdiction of that governmental authority;

In this case, the TRO contained language meeting all three prongs of the QSF test. The Court took exclusive jurisdiction and possession of the assets of defendant SRA Management and relief defendants SRA Funds and Clear Sailing, as well as of the FMOF Entities and NYPA Entities. The Court segregated those assets from the assets of the Defendants by extinguishing all indicia of ownership, dominion and control and enjoined everyone from directly or indirectly controlling those assets. The Court did so for the purpose of resolving the claims alleged by the SEC.

The state tax home of this QSF is California because the court exercising continuing jurisdiction over the assets of the Receivership, the Receiver and the QSF is located in California.[7] California Revenue and Taxation Code ("RTC") § 24693 incorporates IRC § 468B by reference, with modifications to provide that a tax shall be imposed upon the gross income of the fund at a rate equal to the rate in effect under RTC § 23501.[8] Pursuant to RTC § 23051.5(f), the Treasury regulations promulgated under IRC § 468B govern the interpretation of comparable provisions in the RTC.

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> (2) It is established to resolve or satisfy one or more contested or uncontested claims that have resulted or may result from an event (or related series of events) that has occurred and that has given rise to at least one claim asserting liability – . . . [a]rising out of a tort, breach of contract, or violation of law. . .; and
>
> (3) The fund, account, or trust is a trust under applicable state law, or its assets are otherwise segregated from other assets of the transferor (and related persons).

Reg. § 1.468B-1(e)(1) provides that a fund, account, or trust is "ordered by" or "approved by" a governmental authority when the authority issues its initial or preliminary order to establish, or grants its initial or preliminary approval of, the fund, account, or trust, even if that order or approval may be subject to review or revision.

[8] Legal Ruling 93-4 and Franchise Tax Board ("FTB") Notice 93-8 describe the California tax consequences applicable to a QSF established pursuant to the order of a court located in California. FTB Notice 93-8 provides:

> In the absence of evidence establishing a commercial domicile elsewhere, every qualified settlement fund established pursuant to the order of, or approved by, and subject to the continuing jurisdiction of, an agency or instrumentality (including a court of law) of the United States or the State of California (or a political subdivision thereof) located in California is considered to have a commercial domicile in California.

**B. The TRO Supports a Finding of a QSF**

Reg. § 1.468B-1(e)(1) provides that the order or approval necessary to establish a QSF occurs upon the governmental authority's initial or preliminary order or approval of the fund, account, or trust, even if that order or approval is subject to review or revision.

In this case, the SEC alleged that defendant John Bivona orchestrated a Ponzi-like scheme that defrauded investors of up-and-coming technology companies. The SEC alleged that Bivona, together with companies he controlled, raised over $53 million in the SRA Funds, which were marketed as investments in early- to late-stage, pre-IPO technology companies.

On October 11, 2016, the Court entered the TRO, wherein the SEC and the defendants stipulated for entry of an Order appointing a Receiver for the Receivership Entities. Section I. Marshalling of Receivership Assets, pages 3-4 of the TRO provides:

> Pending further Orders, this Court hereby takes exclusive jurisdiction and possession of the assets, of whatever kind and wherever situated, of defendant SRA Management and relief defendants SRA Funds and Clear Sailing, as well as of the FMOF Entities and NYPA Entities. Accordingly, all persons and entities with direct or indirect control over any Receivership Assets and/or any Recoverable Assets, other than the Receiver, are hereby restrained and enjoined from directly or indirectly transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating, or otherwise disposing of or withdrawing such assets.

The language of the TRO extinguishing all indicia and power of ownership, dominion and control of the assets of the Receivership satisfied the third requirement of the three-prong test, which requires the assets to be otherwise segregated from other assets of all other persons.

Section I of the TRO established the QSF. The Investor Group has suggested that only the cash assets or the Receivership Funds were intended to be included in the QSF and reference Section IX of the TRO in support of this suggestion.[9] Section I of the TRO met the three-prong test

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[9] Section IX even by its title does not purport to be an establishment of the Receivership or the powers of the Receiver. Rather, it provides detail regarding one class of property, the Receivership Funds. Section IX. Managing Assets, page 12 of the TRO provides:

> The Receiver shall take all necessary steps to enable the Receivership Funds to obtain and maintain the status of a taxable "Settlement Fund," within the meaning of Section 468B of

and, as set forth above, the mere seizure of assets is sufficient to meet the segregation requirement. Section I was sweeping in its language. In Section I the Court exercised control over the assets of the Receivership Entities, extinguished the Defendants' and others' power over those assets; and did so to resolve claims asserted by the SEC. Thus, in Section I the QSF arose as a matter of law.

**C. The Receivership Assets Cannot be Excluded from the QSF**

The Receiver has evaluated whether it is possible to prevent property of the Receivership Entities from being included in the QSF in the first place; or whether there is a way to remove that property from the QSF with minimal tax impact. The facts of the case and the published authority prevent the exclusion of the Receivership assets from inclusion in the QSF.

The Investor Group has suggested that perhaps only the cash, and not the securities, became part of the QSF. The estate owned an interest in certain publicly traded securities and some of the Receivership Entities were other pre-IPO securities owned pursuant to forward contracts, book entries or stock certificates. The forward purchase agreements ("FPAs") are obligations to deliver a set number of shares at a future time; they are securities futures and are considered securities under federal securities laws. IRC § 1234B(c) provides that the definition of securities future contracts under the Internal Revenue Code is consistent with the definition in § 3(a)(55) of the Securities Exchange Act of 1934. The future contracts are, therefore, property for IRC purposes and for purposes of the application of the related Regulations. These Regulations address the tax treatment of property held, sold and distributed by a QSF and address the gain and loss rules. There is no published authority supporting a different analysis that securities and pre-IPO contracts are somehow not property of the QSF.

Based on the foregoing authority, in order for the Receiver to try to take a different

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the Internal Revenue Code and of the regulations, when applicable whether proposed, temporary or final, or pronouncements thereunder, including the filing of the elections and statements contemplated by those provisions. The Receiver shall cause the Settlement Fund to pay taxes in a manner consistent with treatment of the Settlement Fund as a "Qualified Settlement Fund."

position, the Receiver would require tax rulings from the IRS and the State of California. A tax opinion might protect the Receiver from penalties but would never protect the Receiver from tax owed or interest on the tax if the position supported by the tax opinion proves unsuccessful in the face of an IRS challenge.

### D. Tax Implications on Distribution or Sale of Property from the QSF

There are two "transfer" dates necessary to the understanding of the tax liabilities of the QSF resulting from the sale or transfer of the Receivership assets.

Transfer Date 1. The first transfer date, Transfer Date 1, is the date the assets entered the QSF. In this case, that date is the date of the TRO when the QSF was established as a matter of law and all property of the receivership entities by operation of the Regulations were "transferred" to the QSF. This is the date that establishes the QSF basis in the property, which is the fair market value on that date per the Regulations.

Transfer Date 2. The second transfer date is the date of transfer from the QSF by sale, exchange or distribution, which will establish the value for calculation of gain or loss by the QSF for that property.[10]

Reg. § 1.468B-2(f) requires a QSF to treat any distribution of property as a sale or exchange of that property under §1001(a). In computing gain or loss, the amount realized by the QSF is the FMV of the property on the date of distribution. *See United States v. Brown*, 348 F.3d 1200, 1218-1219 (10th Cir. 2003), which, in citing Reg. § 1.468B-2(f), noted that the QSF's "gain or loss with respect to a particular asset is the difference between the value of the asset when the [QSF] received it and the value of the asset when the [QSF] distributed or sold it." The court in *Brown* distinguished between the QSF as an entity and its beneficiaries, noting that the QSF's gains or losses should not be determined according to the beneficiaries' gains and losses. Rather, the QSF

[10] Reg. § 1.468B-2(e) provides that a QSF's initial basis in property is the fair market value ("FMV") of the property on the date of transfer to the QSF. See also PLR 200741003 (holding that the Trust's initial basis in assets (other than cash) transferred by X to the Trust, including any assets deemed transferred by X to the Trust pursuant to § 1.468B-3(f)(2), is the FMV of any such asset on the date of transfer).

must compute its gain or loss for assets based on the difference in value between the date the QSF received an asset and the date it distributed or sold it. *Id.* at 1218. *See also* PLR 9803019, which mentions Reg. §1.468B-2(f) and the fact "that a QSF must treat a distribution of property as a sale or exchange of that property for purposes of §1001(a). That section further provides that in computing gain or loss, the amount realized by the QSF is the fair market value of the property on the date of distribution."

The distribution of property, whether by sale or transfer of shares to investors, requires an FMV valuation. If there is an increase in FMV from the date the QSF received the asset to the date the QSF distributes it, then the QSF has income subject to potential tax.

The QSF pays federal tax at the flat rate under Reg. § 1.468B-2(a). A QSF must pay tax on its modified gross income at the maximum trust rate (which is currently 37%). Reg. § 1.468B-2(a). See § 1(e). If a QSF distributes a capital asset, any gain will be subject to the higher maximum rate in § 1(e), not the lower capital gains rate. QSFs do not enjoy a preferential capital gain tax rate.

**E. Tax Timing and Deduction Strategies Can Be Implemented**

The Receiver intends to maximize all available deductions and timing tools to mitigate tax liability. For example, taxes may be mitigated by the timing of selling or transferring loss property either in the same year or in a year prior to the year in which gain property would be sold or transferred. For example, the Successor Receiver could sell the loss property in year 1, which in turn would create losses that can be carried forward to later years. The Successor Receiver could then sell gain property in year 2, utilizing the carryforward losses that were created in year 1 to offset any of the gain on the sale or distribution of property in year 2.

Reg. § 1.468B-2(b)(2)-(4) provides that all the QSF deductions are determined to the extent such items would be deductible in determining a corporation's taxable income. Under Reg. § 1.468B-2(b)(3), losses sustained in connection with the sale, exchange, or worthlessness of property held by the fund are deductible.[11] Section 165 (f) limits the deduction for capital losses

[11] The deduction is allowable to the extent the losses would be deductible in determining the

from the sale or exchange of the capital asset to the extent allowed by § 1211 and § 1212. Under § 165 (g), if a security (such as stock, right to stock, bond, debenture, note, or certificate) becomes worthless in the taxable year, the loss is treated as loss from the sale or exchange of a capital asset. Section 1211(a) limits a corporation's capital losses from the sale or exchange of capital assets to the extent of its gains. A QSF can deduct capital losses in connection with the sale, exchange, or worthlessness of capital assets only to the extent of capital gains. Section 1212(a) provides the rules that govern the carryback and carryover of capital losses to offset capital gains in earlier or later years. Just as with a corporation, unless a capital loss would increase or create a corporation's net operating loss in a preceding taxable year, a QSF can carryback a capital loss to each of the three taxable years preceding the loss year or can carryover the capital loss to each of the five taxable years succeeding the loss year. Reg. § 1.468B-2(b)(3). Thus, under Reg. § 1.468B-2(b)(3), a QSF is allowed a loss in connection with the sale of such property to the extent of gains.

## IV. ANALYSIS OF THE SPE APPROACH TO POSSIBLE TAX MITIGATION

The Burack Report advocated for the formation of an entity to mitigate tax liability, although it did not include analysis or description of the steps required, the costs, the procedural process, or the ultimate effectiveness of such a strategy. The Burack Report also does not describe the entity structure, which the Receiver has assumed would be an SPE, such as a limited liability company, limited partnership or a trust, established to manage these assets. The Receiver has explored the possibility of an SPE or other pass-through entity as a possible approach to mitigate tax liability. Though theoretically possible, the SPE Approach appears too costly, inequitable and logistically-challenging to provide a net benefit to all of the constituents of the receivership estate.

### A. Unknown Tax Benefit is Overridden by Costs, Delays and Inequities

#### 1. Purpose of SPE to Remove Appreciating Assets from QSF

The Receiver's tax advisor has considered the viability and consequences of using an SPE

(continued)

taxable income of a corporation under § 165 (f) or § 165(g), and § 1211(a) and § 1212(a).

to distribute appreciating assets from the QSF to provide a tax timing option for the disposition of the property. Under the SPE Approach, the investors would become the owners of the SPE, typically as members in a limited liability company, and the SPE would serve as a holding place for appreciating shares or pre-IPO interests pending the finalization of a distribution plan and distribution of shares to investors. The Receiver could transfer shares or pre-IPO interests that are expected to continue to appreciate to the SPE and thereby fix the "gain" and related tax that would be incurred by the QSF at the date of transfer to the SPE. This strategy will *not* eliminate a tax liability for the QSF upon transfer to the SPE, however. Accordingly, there will already be tax consequences relating to the transfer to the SPE itself. The amount of that tax liability is presently unknown. The potential advantage of transferring Property to a SPE is based on the assumption that the Property to be transferred will continue to appreciate in value prior to distribution to the investors in an amount sufficient to offset the costs of creating and administering the SPE, plus the cost of obtaining a favorable tax ruling from the IRS and State of California on the use of the SPE.

Though facially appealing, the SPE Approach does not appear to be feasible due to a variety of regulations, costs, logistics and the inequities that result from the bifurcated nature of the distribution – cash to creditors and stock to investors.

**2. Logistics and Costs of SPE**

**a. Use of an SPE Will be Inequitable**

The Receiver must pay all administrative and tax liability and make a distribution of cash to unsecured creditors. There is presently insufficient cash on hand to even pay all outstanding administrative liability. Therefore, prior to the transfer to an SPE of any securities, some shares will need to be liquidated to pay those liabilities and also to pay the QSF tax created by the sale of those securities and by the transfer of assets to the SPE. The Receiver cannot sell the pre-IPO shares, so this means that 100% of the administrative, priority and unsecured liability will necessarily be borne by those investors holding the securities that are already public. That will create a windfall for the pre-IPO investors who will not have to bear any of that expense. This result is inequitable when viewing the creditor body as a whole.

Two hypothetical scenarios illustrate the inequities that will result from the use of an SPE, whether some or all of the assets are transferred.

Hypothetical One. The Receiver transfers only pre-IPO interests to the SPE. The consequences of moving only the appreciating pre-IPO contract interests to a SPE to “stop the clock” on appreciation within the QSF and pay the taxes on the post-IPO shares would harm the IPO investors who would have to see their stock sold to satisfy administrative costs, creditor claims and taxes.

Hypothetical Two. The Receiver transfers all the assets in the QSF to a SPE. The property available to transfer to the SPE will be diminished by the securities that will need to be liquidated to pay the QSF tax generated by the transfer. If all assets are transferred to the SPE for the benefit of the investors, the unsecured creditors will not receive anything. Additionally, only the IPO investors will see their shares liquidated so that the Receiver can generate enough cash in the QSF to meet its tax and administrative expenses.

**b. The Costs of an SPE Will be Substantial**

Substantial professional fees will be incurred to create the SPE and in seeking SEC approval, as set forth in detail below. Both an IRS Ruling and a no action letter from the SEC will be required if the SPE Approach is used, and there will be attendant filing fees, professional fees, and substantial delays that could reach 18 months or more. Additionally, there will be one more layer of administrative costs incurred to administer the SPE.

**c. SPE Governance, Funding, and Oversight is Uncertain**

There are governance decisions to be made regarding the SPE. The investors would be the owners of the SPE as members of a limited liability company. The manager or managing member of the SPE will need to be determined. The Court would need to determine whether it is prudent or permissible for the Receiver to serve in this role. The manner in which that manager should be compensated would need to be determined, and securities would need to be sold to fund those fees, which would generate tax liability.

Whether the SPE would have any Court oversight or retain jurisdiction over the SPE are important questions with potential securities and tax ramifications. If the Receiver is not involved in the SPE, who will ensure that securities and tax regulations are complied with? If the Receiver is involved as the manager, does this place the entire SPE and its assets directly back into a QSF?

**B. Securities Implications**

**1. The SPE**

The Receiver has considered the ramifications under the federal securities laws of creating an SPE outside of the receivership to hold property of the Receivership Entities. The assets that would be placed into this SPE could be all of the Receivership assets, or just those with the greatest potential for appreciation in value or the least liquid. These would likely be the pre-IPO Shares and interests in shares in connection with forward purchase contracts ("FPAs").

The owners of this SPE would be the more than 300 the investors in the Receivership Entities. The SPE would need a manager, or board of directors, that would make decisions concerning: (i) when and whether to liquidate the shares and FPAs; (ii) whether and when to make distributions of the shares to the SPE's owners; (iii) the voting of shares on corporate transactions, such as on proposals for a sale of the Portfolio Company or the issuance of additional capital; and (iv) enforcement of rights under contracts, such in cases involving the FPAs where the initial seller may default on his or her obligations to deliver the shares following an initial public offering.

**2. The SPE and the Receivership Estate**

The Receiver would presumably not be in control of any of these decisions once the assets were transferred to the SPE, nor would these decisions be subject to Court oversight. All of the assets cannot be transferred to the SPE, as the transfer would leave the Receivership Estate unfunded and the transfer would create tax liability for the estate and the Receiver personally. If only the pre-IPO and FPAs were transferred to the SPE, then the investors holding an interest in the publicly traded shares that would remain in the Receivership Estate would bear 100% of the liability for administrative claims, unsecured claims and tax liability. This procedural and inequitable problem alone makes the SPE Approach an awkward fit for the facts of this case.

**3. Status of SPE Interests as Securities – Registration Exemptions**

Aside from the procedural challenges is the status of the ownership interests in the SPEs as securities under federal securities laws. The definition of a "security" under the Securities Act is very broad,[12] and includes investment interests in special purpose vehicles where the business and affairs of the entity through which profits are to be realized are managed by others.[13] Under almost any scenario in which an SPE would be formed to manage assets that are currently held by the Receiver, the ownership interests in the SPE would be securities.

The issuance of those SPE interests to the Receivership Entity investors would be subject to the laws governing the sale of securities. A basic rule under federal securities laws is that sales of securities must be registered under Section 5 of the Securities Act unless the security in question or the transaction in which that security is sold is exempt from the registration requirements. The process of registering an offering of securities is exceedingly time consuming and expensive. The only practical way these SPE interests could be issued in compliance with the securities laws is by making certain the offering is subject to an exemption to the registration requirements.

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[12] Section 2(a) of the Securities Act defines a "security" as "any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

[13] *See S.E.C. v. Howey Co.*, 328 U.S. 293 (1946).

**i. Regulation D**

One exemption to the registration requirements that may be available is Rule 506 of SEC Regulation D[14]. There are two distinct exemptions to a sale of securities under Rule 506. Rule 506(b) permits the sale and offer of securities to an unlimited number of accredited investors and up to 35 non-accredited investors in an offering that is not accompanied by any advertising or general solicitation.[15] All non-accredited investors must be sophisticated in that they must have sufficient knowledge and experience in financial and business matters to make them capable of evaluating the merits and risks of the prospective investment. A second exemption is an offering under Rule 506(c), which can be made through a public solicitation but only to accredited investors.

Some challenges in conducting an offering under Rule 506 of the SPEs would be the following:

- The burden of establishing that the potential participants in the offering are accredited or sophisticated investors is on the offeror. It is probable that at least some of the investors are no longer accredited or sophisticated investors, if they no longer meet the financial requirements to be an accredited investor, if an investor has transferred his or her interests to a non-accredited investor, or the original investor has died and transferred his or her interest to the investors heirs and they might be unaccredited and unsophisticated. The promoters of the offering must take steps to verify the status of the persons participating in the SPE, or this exemption could be lost.

- If all of the investors are not accredited or sophisticated, some of the investor group might not be permitted to hold investments in the SPE, making the treatment of the claims of those investors uncertain because the SPE manager may be forced to exclude some of the investors who might otherwise profit from the assets that have the greater chance for capital appreciation.

- A disclosure document describing the risks and benefits of investing in the SPE would need to be provided to the potential participants. If all of the investors in the SPE are accredited investors, there is no set requirement for what the disclosure document provides. If some are not accredited, the document must contain much more detailed financial, business and other disclosures.

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[14] 17 CFR § 230.506 et. seq.

[15] The definition of an accredited investor is in SEC Rule 501(a).

**ii. Section 3(a)(10)**

Another exemption to the registration requirements that could be available to an offering of the SPE units is Section 3(a)(10) of the Securities Act. Section 3(a)(10) has the following requirements:

- The securities must be issued in exchange for other securities, claims or property interests or partly for those securities, claims or property and partly for cash (but not entirely for cash).

- The terms of that exchange must be approved at a hearing upon the fairness of those terms at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval.[16]

The 3(a)(10) exemption can be used in court proceedings where claimants are awarded shares or other securities in resolution of their claims. The parties seeking resolution of their securities claims request a hearing before a court. The court then conducts a hearing at which all persons with an interest in the proceeding are permitted to appear and determines the fairness of the securities proposed to be offered. Unlike the Regulation D exemption, the court would not be obligated to limit the issuance of the securities to a limited number of non-accredited investors or prohibit them from being issued to persons who were not sophisticated.

Here, the Court would be requested to conduct a hearing on whether to permit the SPE to be created for the purposes intended and to issue interests in the SPE to those investors. Some particular challenges such a proceeding could pose in this case are the following:

- The Receiver and the others promoting the creation of the SPE must prepare a disclosure document that would be approved by the Court to submit to the claimants. The SEC has not promulgated rules that describe its content. However, at a minimum, it would need to comply with the anti-fraud requirements of the securities laws to avoid false and misleading information and provide information sufficient to allow the investors to make an informed choice as to whether to object at the hearing.

- The Court needs to find that the offering of the SPE units is substantively fair in order to comply with Section 3(a)(10). This is a departure from federal securities laws, which in theory does not evaluate the fairness of a securities offering but, rather whether the

[16] 15 U.S.C.§ 77c(a)(10) (2019).

> disclosure was proper. In making the arguments, all aspects of fairness of the proposal will need to be evaluated. For the SPE established here, issues such as how the proposal might affect different groups of claimants or different groups of investors would need to be addressed.

In summary, while the issuance of interests in an SPE might be possible, the procedural hurdles will be costly, and applicability of the available exemptions is not guaranteed.

**4. Status of SPE as an Investment Company**

**i. Investment Company Act**

Another federal securities law relevant to the establishment of the SPE is the Investment Company Act of 1940.[17] The Investment Company Act imposes a comprehensive regulatory scheme on businesses that are defined as an "investment company" and are not otherwise exempt. Investment companies that are not exempt are required to register as investment companies with the SEC. If they do not register, they are prohibited from engaging in any business activities in interstate commerce under Sections 7(a) and 7(b) of the Investment Company Act. The costs of complying with the Investment Company Act's regulatory regime would make the SPE impracticable if its activities required it to register as an investment company. Section 3(a) of the Investment Company Act defines an "investment company" as a business that comes within several categories, the following two of which are relevant to the SPE:

- It is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;
- It is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.[18]

Although both definitions may apply, the second – that of owning, holding and trading in

[17] Codified at 15 U.S.C § 80a–1 et. seq. (2019).

[18] 15 U.S.C. § 80a–3.

securities and owning investment securities that have a value exceeding 40% of the SPE's total assets – is the most applicable to the SPE. The SPE is being formed for the purpose of holding securities consisting the pre-IPO shares and FPAs and to trade the shares once the companies whose shares are held go public.

Exclusions to the definition of an investment company in the Investment Company Act that venture capital funds and private equity funds that invest in pre-IPO companies typically rely upon will likely be unavailable to the SPE. Two of these exemptions are: (i) an exemption for a fund that has no more than 100 beneficial owners under Section 3(c)(1) of the Investment Company Act; and (ii) an exemption under Section 3(c)(7) for funds whose owners are all "qualified purchasers" (often referred to as "super-accredited investors.")[19] The SPE would have approximately 300 members, which would make the exemption in Section 3(a)(1) unavailable, and not all of the investors in the SPE would meet the high standard required to be a qualified purchaser.

**ii. Exemptions for Liquidating and Transitory Investment Companies.**

Businesses that fall within the definition of an "investment company" have exemptions that may be available to the registration requirements. One that may be available to the SPE is found in Section 7(a) and 7(b) of the Investment Company Act. The last sentence of each of those sections

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[19] 15 U.S.C § 80a–2 defines a qualified purchaser as:

(i) any natural person (including any person who holds a joint, community property, or other similar shared ownership interest in an issuer that is excepted under section 80a–3(c)(7) of this title with that person's qualified purchaser spouse) who owns not less than $5,000,000 in investments, as defined by the Commission;

(ii) any company that owns not less than $5,000,000 in investments and that is owned directly or indirectly by or for 2 or more natural persons who are related as siblings or spouse (including former spouses), or direct lineal descendants by birth or adoption, spouses of such persons, the estates of such persons, or foundations, charitable organizations, or trusts established by or for the benefit of such persons;

(iii) any trust that is not covered by clause (ii) and that was not formed for the specific purpose of acquiring the securities offered, as to which the trustee or other person authorized to make decisions with respect to the trust, and each settlor or other person who has contributed assets to the trust, is a person described in clause (i), (ii), or (iv); or

(iv) any person, acting for its own account or the accounts of other qualified purchasers, who in the aggregate owns and invests on a discretionary basis, not less than $25,000,000 in investments.

exempts from the registration requirements those investment companies that are solely engaging in transactions that are incidental to their dissolution. In no-action letters, the SEC has examined the following three factors in determining whether this exemption will apply to an investment company:

- The company must have a limited purpose. In order to satisfy this requirement, the sole purpose of the company must be to liquidate its assets and distribute the proceeds to its owners.[20] If any proceeds from the sale or other liquidation are held for any period of time, they can only be held in short-term, investment-grade investments.[21]

- The entity must have a limited duration, meaning that it must liquidate within a reasonable period of time. Generally, three years has been considered a reasonable amount of time, although longer periods may be permissible in some cases or shorter periods required depending upon circumstances.[22]

- The ownership interests in the company must have limited rights of transfer.[23]

Another exemption that may be available is the "transient investment company" exemption which exempts a company from being an investment company (rather than only the registration requirements) under SEC Rule 3a-2. This exemption is primarily designed for a business that accidentally becomes an investment company, such as by acquiring a valuable security or temporarily scaling back business operations while holding investment assets.

One requirement for this exemption is that the company have a bona fide intent to engage primarily, as soon as is reasonably possible, in a business other than that of investing, reinvesting, owning, holding or trading in securities. Another is that the exemption only is available for one year, although the SEC may permit a longer period upon an application from the company.

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[20] *See* JMB Income Properties Ltd.- IX, SEC No-Action Letter, 1997 WL 203187 (April 24, 1997) (JMB No Action Letter).

[21] *See* Integrated Resources, Inc., SEC No-Action Letter, 1994 WL 466220 (August 5, 1994) (Integrated Resources No-Action Letter).

[22] *See* JMB No-Action Letter.

[23] MPC Liquidating Trust, SEC No-Action Letter, 1994 WL 85836, (Mar. 10, 1994) (MPC No-Action Letter).

Because the SPE would likely be unable to liquidate its pre-IPO assets within one year, this exemption is likely less applicable.

The SPE must closely follow the guidelines set forth in the SEC No-Action letters if it wishes to avail itself of the exemption to register as an investment company under Section 7(a) and (b). This will include narrowly restricting the discretionary actions it may take with respect to the shares and FPA assets it owns and manages, placing strict limitations on how it reinvests funds received from the disposition of the Portfolio Company shares, prohibiting or strictly limiting any new investments and setting out a definite period of time within which it dissolves. The Receiver would also need a no-action letter from the SEC to confirm the SPE does not have to register as an investment company.

**5. Nonassignability of Some Securities**

Whether the pre-IPO shares and the interest in the FPAs are transferrable is another variable that could prohibit the transfer of some of the assets to an SPE. Some of the securities prohibit assignment without the consent of the seller. The FPAs that prohibit assignment without the consent of the seller may present difficulties if the FPAs are to be removed from the receivership and assigned to a SPE. Non-assignment provisions are generally enforceable under California law and will be enforced to prohibit a party from assigning its rights under a contract if the non-assignment provision specifically refers to assignments of rights as requiring the consent of the seller. *Masterson v. Sine*, 68 Cal. 2d 222, 229 (Cal. 1968). The right under the FPA that would need to be assigned to the special purpose entity is the right to require the seller of the shares to transfer them to the special purpose entity when the transfer to the SPE occurs. If the consent of the seller is not obtained to this assignment, the SPE may be unable to enforce its right to obtain the shares from the seller upon the transfer to the SPE.

## V. CONCLUSION

The Receiver respectfully requests the Court: (1) provide instructions as to which approach to pursue for distribution; (2) authorize the filing of QSF tax returns and any required information returns for 2016, 2017, 2018 and all years going forward; (3) authorize the Receiver to proceed with valuation of the Receivership assets as of the date of creation of the receivership; and (4) grant all other appropriate relief.

DATED: December 16, 2019

DIAMOND McCARTHY LLP

By: *__/s/ Lesley Anne Hawes__*
Lesley Anne Hawes, Attorney for Kathy Bazoian Phelps, Successor Receiver

# Exhibit 1

KATHY BAZOIAN PHELPS (State Bar No. 155564)
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*Successor Receiver*

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**SAN FRANCISCO DIVISION**

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|---|---|
| SECURITIES AND EXCHANGE COMMISSION,<br><br>Plaintiff,<br><br>v.<br><br>JOHN V. BIVONA; SADDLE RIVER ADVISORS, LLC; SRA MANAGEMENT ASSOCIATES, LLC; FRANK GREGORY MAZZOLA,<br><br>Defendants, and<br><br>SRA I LLC; SRA II LLC; SRA III LLC; FELIX INVESTMENTS, LLC; MICHELE J. MAZZOLA; ANNE BIVONA; CLEAR SAILING GROUP IV LLC; CLEAR SAILING GROUP V LLC,<br><br>Relief Defendants. | Case No. 3:16-cv-01386-EMC<br><br>**RECEIVER'S PROPOSED PLAN OF DISTRIBUTION**<br><br>Date: **[No Hearing Set]** ~~June 27, 2019~~<br>Time: ~~1:30 p.m.~~<br>Place: Courtroom: 5<br>450 Golden Gate Ave<br>San Francisco, CA<br>Judge: Edward M. Chen |

Kathy Bazoian Phelps, the successor Receiver herein (the "Receiver"), presents her Plan of Distribution as follows:

## I. Procedural History

1. The Securities and Exchange Commission ("Commission" or "SEC") filed a complaint commencing this action on March 22, 2016, and Sherwood Partners was appointed as the Independent Monitor on March 25, 2016 (ECF 36).

2. Pursuant to the Stipulated Order for Appointment of Receiver so ordered on October 11, 2016 (ECF 142), the Court appointed Sherwood Partners, Inc. (the "Former Receiver") as the Receiver to take possession and control of the assets of the following entities: SRA Management Associates, LLC ("SRA Management"), SRA I LLC ("SRA I"), SRA II LLC ("SRA II"), SRA III LLC ("SRA III") (together, "SRA Funds"), Clear Sailing Group IV LLC and Clear Sailing Group V LLC (together, "Clear Sailing"), and third-party affiliated entities NYPA Fund I LLC ("NYPA I"), NYPA II Fund LLC ("NYPA II") (together, "NYPA Funds") and NYPA Management Associates LLC (collectively, "NYPA Entities") and Felix Multi-Opportunity Funds I and II, LLC ("FMOF I and II") (together, "FMOF Funds") and FMOF Management Associates, LLC (collectively, "FMOF Entities"). Pursuant to the Court's Civil Minutes entered on June 27, 2019 (ECF 503), the Solis Associates Fund LLC ("Solis") was substantively consolidated into the receivership estate. SRA Management, SRA I, SRA II, SRA III, Clear Sailing, NYPA Entities, FMOF Entities and Solis are ~~(~~collectively referred to as~~,~~ the "Receivership Entities").

3. By Order entered on February 28, 2019, the Court appointed Kathy Bazoian Phelps as the successor Receiver (the "Receiver").

4. At a hearing on February 28, 2019, the Court heard arguments relating to a proposed Revised Distribution Plans that, pursuant to the Court's Order re Proposed Distribution Plans dated December 20, 2018 (ECF 443), combined components of competing distribution plans submitted by the SEC and the Former Receiver, on the one hand, and Interested Party SRA Investor Group ("Investor Group"), on the other hand. Prior to that date, the Court held a number of hearings and considered objections and considered supplemental and revised terms of the competing Distribution Plans, which have been amended. The Receiver has met and conferred with the SEC, the SRA Investor Group, Global Generation Group LLC, Progresso Ventures, LLC, and Pradeep Sindhu ~~and~~

~~believes that the terms of this Plan most equitably address the interests of the various interested parties~~.

**II. Plan Definitions**

"Administrative Claims" means accrued and unpaid Receiver's and retained professionals' fees and expenses, costs of administration of the Receivership Estate, including storage, insurance, or any other expenses attributable to the administration of the receivership, except for Priority Claims.

"Administrative Cash Reserve" means the amount of funds from the Plan Fund that the Receiver shall retain as undistributed funds for purposes of paying potential tax liability, expenses to wind down the Receivership Estate, and for other unanticipated costs of the Receivership.

"Administrative Stock Reserve" means the number of shares to be retained by the Receiver as undistributed shares to the Investor Claimants for purposes of paying potential tax liability, expenses to wind down the Receivership Estate, and for other unanticipated costs of the Receivership.

"Allowed Claim" means a claim by an investor or creditor that the Receiver in consultation with the SEC Staff and Claims Agent has determined is represented by a valid invoice, receivable, right to payment, interest or debt against the Receivership Entities supported by the submissions of the investor or creditor claimant, the books and records of the Receivership Entities, or other sources of information reasonably available to the Receiver. Allowed Claims will be classified under this Plan as Administrative Claims, Priority Claims, Investor Claims, Unsecured Creditor Claims or Subordinated Claims. "Allowed Claim" also includes any late-filed Investor Claim that was timely submitted during the Re-opened Claims Period or that has otherwise been accepted by the Court as a timely-filed claim.

"Avoidance Action" means any cause of action, or defense against an action, to avoid or recover a transfer of property of the Receivership Estate or interest of the Receivership Entities in property, including actions, or defenses arising under applicable federal, state or common law.

"Bivona Bankruptcy Case" means the Chapter 7 bankruptcy proceeding of John Vincent Bivona, Case No. 16-12961-SCC, in the United States Bankruptcy Court for the Southern District of New York.

"Cause of Action" means a claim, right, action, chose in action, suit, cause of action, or judgment, belonging to the Receivership Estate and any and all claims to recover liabilities, obligations, and debts owing to the Receivership Estate, whether arising prior to or after October 11, 2016.

"Claims Agent" means Stretto fka Corporate Restructuring ("JND") of Denver Colorado.

"Claim Objection" means an objection served by the Receiver on any person or entity for which the Receiver disputes the claim filed. The Receiver may also object to any request for payment or transfer of assets even if a formal proof of claim was not filed. The Receiver shall set a Claim Objection for hearing, providing notice and opportunity for hearing to the claimant pursuant to the Court's Local Rules.

"Disallowed Claims" include claims, whether or not formally and timely filed, belonging to or asserted by or on behalf of or for (i) John V. Bivona; (ii) Frank Mazzola; (iii) Anne Bivona; (iv) Michele Mazzola; (v) David Jurist; (vi) Alice Jurist; (vii) former agents or employees of Saddle River, Felix Investments, LLC, FMOF Management Associates LLC, NYPA Management Associates LLC, SRA Management, Clear Sailing Group IV LLC, Clear Sailing Group V LLC, and the Fortuna Fund Management LLC; (viii) other insiders (including but not limited to Emilio DiSanluciano and Joshua Cilano); (ix) management fees; (x) in~~I~~ter-company claims; (xi) any claim for the guarantee of a debt or financial obligation for the benefit of insiders, including but not limited to John V. Bivona, Frank Mazzola, Anne Bivona, Michele Mazzola, David Jurist, and Alice Jurist, by FMOF Management, or NYPA Management or any other of the Receivership Entities; (xii) any claim for the guarantee of a debt or financial obligation in connection with a Failed Investment, including but not limited to claims of Investor Nos. 51 and 135; (xiii) any claim that has been disallowed by an order of the Court after notice and a hearing; and (xiv) any claim that was filed with the Receiver after May 14, 2019 that has not been expressly allowed by an order of the Court after notice and a hearing. The definition of "Disallowed Claim" excludes a claim or claims filed on behalf of Fortuna Funds by Stephen Soler, unless such claim or claims are disallowed on another basis.

"Disgorgement Funds" or "Fair Fund" means monies collected by the Commission that are ordered paid to the Commission or the Receivership pursuant to a final judgment entered in this case.

"Distribution" means the disbursement of securities or money from the Distribution Account or a Receivership Entity account to Eligible Claimants pursuant to the Distribution Plan.

"Distribution Account" means a checking account or accounts established by the Receiver to receive the monies from the Corporate Defendants, Relief Defendant Entities and affiliated third party entities that are scheduled to be disbursed in accordance with the Distribution Plan. "Distribution Account" shall also mean a checking account established by the Receiver to accept Disgorgement Funds or Fair Fund monies from the Commission, subject to any limitations on disbursement required by the Commission. Multiple such accounts may be necessary to ensure that the entire amount deposited is insured by the Federal Deposit Insurance Corporation.

"Distribution Plan" or "Plan" means this Revised Plan of Distribution for the resolution and distribution of funds on claims to investors and creditors harmed as a result of the violations alleged in the Commission's complaint.

"Distribution Plan Notice" means the written notice to investors and creditors that the Plan is approved and they are eligible for a distribution pursuant to this Distribution Plan, unless they receive a Claim Objection. The Distribution Plan Notice will be subject to Court approval.

"Eligible Claimant" means any investor or creditor with an Allowed Claim.

"Failed Investment" means any of the companies in which the Receivership Entities offered investments in securities in companies which were pre-IPO, did not go public and have a liquidity event, and have failed. Those companies as of the date of this Plan are Alphcom dba Jawbone, Badgeville Inc., Candi Controls, Glam, Jumio Inc., Odesk, Practice Fusion, Virtual Instruments, eSolar and Silver Springs Network . Any intended investment which fails to go public after approval of this Plan is intended to be included in the definition of Failed Investment.

"Final Schedule of Proposed Stock Distributions" means the schedule to be filed by the Receiver of proposed stock distributions to Investor Claimants in connection with a particular Successful Investment, which schedule shall include the following: (a) the claimants who will receive shares; (b) the number of shares to be given to each claimant; (c) the number of shares sold to contribute to the Plan Fund; (d) the number of shares sold to pay any estimated tax liability; and (e) the number of shares or cash to be held back as the Administrative Stock Reserve.

"Flurry Investor Claims" means the amounts owed to investors who had invested in Flurry and who have not yet received distributions in accordance with their Allowed Claims.

"Investor Claims" means claims by investors who purchased securities with or through the Receivership Entities and which are Allowed Claims. Investor Claims shall be calculated as the principal amount invested in or through the Receivership Entities for which there has been no distribution, less amounts previously returned to an investor. Investor Claims shall include investments made in Clear Sailing which began in mid-2011. Claims of Fortuna Fund LLC I and Fortuna Fund LLC II (collectively, the "Fortuna Fund") which in turn invested in Clear Sailing on behalf of individual investors shall be treated as Investor Claims but individual investors in Fortuna Fund will not receive a distribution from the Receivership Estate but will receive a distribution through Fortuna Fund. Investor Claims shall not include investments made through entities that are not Receivership Entities.

"Investor Claimants" are those individuals or entities who hold an Allowed Investor Claim.

"Late Filed Claims" means any written claims submitted using the approved claim form(s) to the Former Receiver or Receiver after January 31, 2018 but on or before May 14, 2019. Late Filed Claims shall be deemed Allowed Claims unless objected to or disallowed on another basis.

"Other Recoveries" means any investor or creditor recovery for capital, profit, claims or damages, other than through the Distribution Plan, including but not limited to any funds received or reasonably expected to be received in the Bivona Bankruptcy Case, from other litigation or from third party sources, included but not limited to payment on personal guarantees, except as otherwise provided for by agreement between the Receiver and an Eligible Claimant.

"Plan Fund" means the cash generated from the sale of securities in the Successful Investments in a sum approximately equal to 30% of the gross amount invested by the Investor Claimants in each of the Successful Investments. Additionally, the Plan Fund will include any surplus shares of Successful Investments that can be sold by the Receiver and funds generated from the sale of securities for the purpose of paying Class 1, 2, and 3 claims as set forth in this Plan. It is presently understood, if each current investment that is not a Failed Investment becomes a Successful Investment, that 30% of the gross investments is $13,889,696, but that figure may decrease if any of the current pre-IPO securities do not ultimately become Successful Investments.

"Priority Claims" means any tax, wage, or other claims entitled to priority distribution under applicable state or federal law, including without limitation title 31 U.S.C. § 3713 and any similar state statute.

"Receivership Claims" means any legal claims the Receivership Entities have against third parties.

"Receivership Entities" means SRA Management Associates, LLC ("SRA Management"), SRA I LLC ("SRA I"), SRA II LLC ("SRA II"), SRA III LLC ("SRA III") (together, "SRA Funds"), Clear Sailing Group IV LLC and Clear Sailing Group V LLC (together, "Clear Sailing"), and third-party affiliated entities NYPA Fund I LLC ("NYPA I"), NYPA II Fund LLC ("NYPA II") (together, "NYPA Funds") and NYPA Management Associates LLC (collectively, "NYPA Entities") and Felix Multi-Opportunity Funds I and II, LLC ("FMOF I and II") (together, "FMOF Funds") and FMOF Management Associates, LLC (collectively, "FMOF Entities") and Solis Associates Fund LLC ("Solis").

"Receivership Estate" means the assets and property, in whatever form, of the Receivership Entities.

"Re-opened Claims Period" means the extended time for filing claims through May 14, 2019 pursuant to the Receiver's Notice of New Claims Bar Date.

"Subordinated Claims" means and includes an Allowed Claim for: (1) broker fees and backend commissions, (2) penalty or other properly subordinated claims in connection with outstanding tax liabilities; and (3) claims which have been subordinated pursuant to Court order or agreement between the Receiver and an Eligible Claimant. The claim of the SEC arising from its Final Judgment is deemed satisfied upon the Court's approval of a distribution plan and shall not receive any distribution pursuant to this Plan. Subordinated Claims do not include Disallowed Claims.

"Surplus Shares" means the number of shares in a particular investment owned by the Receivership Estate that exceeds the number of shares claimed by Investors in that particular investment on account of the net amount of their investment.

"Square Investor Claims" means the amounts owed to investors who had invested in Square and who have not yet received distributions in accordance with their Allowed Claims.

"Successful Investment" means any of the companies in which the Receivership Entities offered investments in securities in companies which were or are pre-IPO that ultimately went and go public and had or have a liquidity event.

"Tax Holding Account" means a bank account to be established by the Receiver and funded with the proceeds of the sale of securities in amount sufficient to cover the full amount of state and federal taxes that are estimated to be generated from the sale and distribution of securities for each of the Successful Investments.

"Unsecured Creditor Claims" means the total amount owed or amount owed by agreement on loans, business debt, money judgments to the Eligible Claimants identified on Exhibit "1" as may ultimately be determined to be Allowed Claims.

**The Assets of the Estate**

The assets of the estate consist of cash and securities as follows:

A. Unencumbered cash: Approx. $_______

B. Securities: The estate holds an interest in securities, some of which are publicly held shares and others of which are pre-IPO and are held in the form of book entries or are owing in connection with forward contracts. The estate asserts an interest in some securities held by Equity Acquisition Corp Ltd (-"EAC"), which remains subject to potential resolution or litigation, which are reflected in the "Possible Variance" column:

| Company | Securities Owned by Estate | Possible Variance | Total if Variance Realized | Current Status |
|---|---|---|---|---|
| Addepar, Inc. | 1,029,298 | (33~~5~~,789~~000~~) | 995~~4~~,509~~298~~ | Pre-IPO |
| Airbnb | 0 | 11,125~~286~~ | 11,125 | Pre-IPO |
| Bloom Energy Inc. | 90,667 | (2,349~~3,524~~) | 88,318~~87,143~~ | Public |
| Bloom Energy Inc. (Solis Funds) | 59,111 | | 59,111 | Public |
| Cloudera, Inc. | 45,038 | (7,399~~400~~) | 37,639~~8~~ | Public |
| Dropbox, Inc. | 46,000 | | 46,000 | Public |
| Evernote Corp. | 100,000 | (3,892) | 96,108 | Pre-IPO |
| Lookout, Inc. | 212,476 | (37,676) | 174,800 | Pre-IPO |

| | | | | |
|---|---|---|---|---|
| Lyft, Inc. | 0 | 9,479~~11,000~~ | 9,479~~11,000~~ | Public, held by EAC |
| MongoDB Inc. | 20,000 | 6,250 | 26,250 | Public |
| Palantir Inc. | 5,422,600 | 317,649 | 5,740,249 | Pre-IPO |
| Pinterest, Inc. | 0 | 23,206~~32,519~~ | 23,206~~32,519~~ | Public~~Pre-IPO~~, held by EAC |
| Snap, Inc. | 31,172 | | 31,172 | Public |
| Uber Inc. | 0 | 500 | 500 | Public, held by EAC |
| ZocDoc, Inc. | ***20,104 unconfirmed*** | 1,495~~4~~ | 21,59~~8~~9 | Pre-IPO |

**III. Claims of Receivership Estate**

**A. Claims Bar Date and Late Claims**

1. Prior to the Receiver's appointment, the Former Receiver served a Notice of Bar Date, establishing January 31, 2018 as the claims bar date (the "Original Bar Date").

2. Approximately 17 claims were submitted after the Original Bar Date, but prior to the date when the Former Receiver submitted a Claims Report to the Court on June 14, 2018 [Docket No. 340] ("Former Receiver's Claims Report").

3. Approximately 8 additional claims were submitted after the filing of the Former Receiver's Claims Report but prior to the appointment of the Receiver.

4. At the hearing on February 28, 2019 at which the Receiver was appointed, the Receiver requested authority to serve a new notice of a claims bar date to provide creditors and investors who had not received notice an opportunity to file claims. The date of May 14, 2019 was fixed as the new bar date for these claims (the "Supplemental Bar Date"), and the Receiver served notice of that bar date pursuant to the Court's Minute Order dated February 28, 2019 [Docket No. 470].

5. On March 12, 2019, the Receiver served a second Notice of Bar Date on those parties who the Receiver believed may not have received notice of the Original Bar Date.

6. Following the Receiver's appointment on February 28, 2019, the Receiver received 23 new claims that were submitted prior to the Supplemental Bar Date. The Receiver reviewed all claims filed after February 28, 2019, and concluded that no objection based on timeliness was

appropriate under the circumstances. By separate motion, the Receiver advised the Court of the Receiver's conclusions and no intention to object to the late-filed claims on the basis of timeliness. However, the absence of an objection on the basis of untimeliness is not a waiver of any rights of the Receiver to file an objection on any other basis or to object on the grounds of timeliness to any claim submitted in writing after the May 14, 2019 Supplemental Bar Date, whether any such claim has been submitted in writing or was submitted on an informal basis before or after the Supplemental Bar Date.

7. Any claimant wishing to assert a claim against the Receivership estate after May 14, 2019 will need to seek leave of Court to do so. ~~The Receiver has requested an order that, a~~Absent a Court order allowing such a claim, any claim submitted after May 14, 2019 shall be barred without need to obtain further order of the Court.

**B. Objections to Claims**

The Receiver reviewed the information aggregated by the Former Receiver relating to claims, has obtained claims information from the Former Receiver's claims agent, and conferred with both the SEC and the Investor Group regarding claims issues. As a result, the Receiver filed a Motion to Disallow Certain Claim. In summary, the Motion to Disallow Certain Claims seeks disallowance of the following categories of claims:

- Claims which have received prior distribution
- Claims made for funds paid to non-receivership entities
- Duplicate claims
- Claims for Failed Investments

The Receiver may, in her discretion, file subsequent objections to claims, and shall provide notice and an opportunity to object and be heard pursuant to the Court's Local Rules to any claimant whose claim is affected.

**C. Classes of Claimants**

The Receiver has categorized the remaining claims which she believes to be valid into the following classes of claimants:

Class 1: Administrative Claims

Class 2: Priority Claims

Class 3: Unsecured Creditor Claims

Class 4: Investor Claims

Class 5: Subordinated Claims

These classes of claims and the proposed treatment of each class are discussed below.

**1. Class 1**

Class 1 consists of the Administrative Claims. It is contemplated these Administrative Claims will consist primarily of the Receiver's fees and costs and the fees and costs of professional retained by the Receiver.

**2. Class 2**

Class 2 consists of the Priority Claims. The priority claims will likely consist substantially, if not entirely, of tax claims. At the present time, two tax claims have been submitted by the New York Department of Tax and Finance in the amount of $20,940.

Other anticipated tax claims that would constitute Priority Claims are tax liability at both the federal and state levels attributable to the sale and disbursement of securities. The amount of the tax liability that will be realized from the sale of securities to fund the payments to the Class 1, 2 and 3 classes and from the disbursement of securities to Class 4 is presently unknown.

This Plan contemplates that additional securities will be sold as necessary to fund the estimated tax liability from the sale and distribution of securities.

This Plan does not provide any tax advice and all Unsecured Creditors and Investor Claimants are encouraged to consult their own tax advisor regarding any tax consequences of this Plan.

In any event, no distribution will be made to Classes 3, 4 or 5 until such time as Class 1 and 2 claims have been paid in full or sufficient reserves are held to ensure payment in full to Classes 1 and 2.

**3. Class 3**

Class 3 consists of the Unsecured Creditor Claims identified on Exhibit "1." This Plan contemplates that the Unsecured Claims will be paid from the Plan Fund, which shall be funded by cash generated from the sale of securities as set forth in detail below. The Plan Fund will be used to pay Classes 1, 2 and 3. To the extent there is a surplus of cash following payment of those classes, the surplus will be used to pay Class 5 claims on a pro rata basis. To the extent there is a deficiency, Classes 1 and 2 will be paid in full, and Class 3 will receive a pro rata distribution on account their claims from the remaining funds in the Plan Fund following payment in full to Classes 1 and 2 claimants.

**4. Class 4**

Class 4 consists of the Investor Claims, which have been divided by the company in which the claimants invested. The Class 4 claims are identified by Investor I.D. number and by intended investment in Exhibits “2” through “15” attached hereto and identified as follows:

| | | |
|---|---|---|
| Class 4A: | Addepar | Exhibit “2” |
| Class 4B: | Airbnb | Exhibit “3” |
| Class 4C: | Bloom Energy | Exhibit “4” |
| Class 4D: | Cloudera | Exhibit “5” |
| Class 4E: | Dropbox | Exhibit “6” |
| Class 4F: | Evernote | Exhibit “7” |
| Class 4G: | Lookout | Exhibit “8” |
| Class 4H: | Lyft | Exhibit “9” |
| Class 4I: | MongoDB | Exhibit “10” |
| Class 4J | Palantir | Exhibit “11” |
| Class 4K: | Pinterest | Exhibit “12” |
| Class 4M: | Snap, Inc. | Exhibit “13” |
| Class 4N: | Uber | Exhibit “14” |
| Class 4O: | ZocDoc | Exhibit “15” |

The shares that have been confirmed by the Receiver as owned by the estate are set forth below. There are possible variances in the number of shares the estate may own based on cross-issues with EAC. The following chart reflects the shares owned, the possible variance, the total shares possible for distribution based on variances, and the total shares claimed.

| **Company** | **Securities Owned by Estate** | **Possible Variance** | **Total if Variance Realized** | **Shares Claimed by Investors** |
|---|---|---|---|---|
| Addepar, Inc. | 1,029,298 | (33,789~~35,000~~) | 995,509~~994,298~~ | 995,509 |
| Airbnb | 0 | 11,125~~11,286~~ | | 11,125 |
| Bloom Energy Inc. | 90,667 | (2,349~~3,524~~) | 88,318~~87,143~~ | 117,017 |
| Bloom Energy Inc. (Solis Funds) | 59,111 | | 59,111 | 22,566 |

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| | | | | |
|---|---|---|---|---|
| Cloudera, Inc. | 45,038 | (7,399~~7,400~~) | 37,639~~8~~ | 37,639 |
| Dropbox, Inc. | 46,000 | | 46,000 | 46,000 |
| Evernote Corp. | 100,000 | (3,892) | 96,108 | 88,287 |
| Lookout, Inc. | 212,476 ~~*unconfirmed*~~ | (37,676) | 174,800 | 171,797 |
| Lyft, Inc. | 0 | 9,479~~11,000~~ | 9,479~~11,000~~ | 9,479 |
| MongoDB Inc. | 20,000 | 6,250 | 26,250 | 22,171 |
| Palantir Inc. | 5,422,600 | 317,649 | 5,740,249 | 5,895,853 |
| Pinterest, Inc. | 0 | 23,206~~32,519~~ | 23,206~~32,519~~ | 23,206 |
| Snap, Inc. | 31,172 | | 31,172 | 31,173 |
| Uber Inc. | 0 | 500 | 500 | 500 |
| ZocDoc, Inc. | ***21~~0~~,599~~104~~ unconfirmed*** | 1,49~~4~~5 | 21,599~~8~~ | 21,598 |

The Plan below contemplates that some of these securities will be liquidated to fund payment of the Class 1, 2, and 3 claims.

**5. Class 5**

Class 5 consists of the Subordinated Claims. It is presently unknown whether any distribution will be made to Class 5 creditors. The source of any distribution to Class 5 creditors will be any surplus monies in the Plan Fund after Classes 1, 2, and 3 have been paid in full. To the extent that any surplus funds remain following payment in full of Class 5 claims, those funds shall be distributed s to the Investors on a pro rata basis using their gross investment amount. The Class 5 Subordinated Claims that are presently known are:

Progresso Ventures: $552,936.43

Kenneth Lacey: $500,000.00

Alexander Pisemski $500,000.00

Carsten Klein: $100,000.00

**IV. Substantive Consolidation of Solis Fund**

~~According to an Agreement and Plan of Merger by and among Solis Associates I, LLC, Solis Associates II, LLC and Solis Fund Associates LLC effective as of August 12, 2013, the entities Solis Associates I, LLC ("Solis I") and Solis Associates II, LLC ("Solis II") were merged into the surviving entity Solis Fund Associates LLC ("Solis Fund"). Solis I and Solis II agreed that those~~

~~entities would be terminated and members of those entities would become members of Solis Fund, the surviving entity. The Amended and Restated Limited Liability Company and Operating Agreement of Solis Associates Fund LLC ("Amended Solis LLC Agreement") of the same date, August 12, 2013, recites that the primary purpose of Solis Associates Fund LLC was to acquire and hold interests in Bloom Energy Corporation ("Bloom"), eSolar, Inc., and Silver Spring Networks, Inc.~~ Pursuant to the Court's Civil Minutes entered on June 27, 2019 (ECF 503), the Solis Associates Fund is substantively consolidated into the receivership estate. ~~The Receiver believes that~~ Solis Associates Fund LLC and the surviving entity Solis Fund Associates LLC are one and the same entity and that the name of Solis Associates Fund LLC in the Amended Solis LLC Agreement incorrectly transposed the name of Solis Fund. ~~Further, the Receiver is informed and believes t~~The remaining investors in Solis Fund only have claims for investments in Bloom Energy Corporation ("Bloom Energy") as the other companies that were targeted for investment are no longer operating.

~~Solis Fund was managed by John V. Bivona through SRA Management Associates LLC. The Receiver is advised that funds of the Receivership Entities were used to acquire shares in Bloom Energy for Solis Fund investors. Additionally, the records reflect that there has been commingling of funds and assets and a failure to recognize the Solis Fund entity as a separate entity, but rather that it was treated similar to and as part of the other group of Receivership Entities.~~

~~For these and other reasons,~~ Solis Fund is~~should be~~ formally added as one of the Receivership Entities with its assets made part of the Receivership Estate. The interest of Investor Claimants in Bloom Energy shares will be combined with the interest of the investors in the Solis Fund in Bloom Energy shares so that all Bloom Energy shares held in the name of the Solis Fund and the Receivership Entities will be available to satisfy the claims of Solis Fund investors and the Investor Claims of investors with an interest in Bloom Energy shares. The Bloom Energy shares shall otherwise be distributed in accordance with the terms of this Plan.~~.~~

## ~~V. Appointment of Investor Advisory Committee~~

~~An Investor Advisory Committee (the "IAC") shall be appointed following approval of the Plan. The Receiver will accept nominations for interested parties who wish to serve on the IAC. The~~

~~Receiver will meet and confer with the SEC, the SRA Investor Group, and Progresso Ventures, LLC in an effort to reach agreement on the individuals who will serve on the IAC. If no agreement can be reached, the Receiver will file a motion with a list of all identified names and will provide an opportunity for the SEC, the SRA Investor Group, Progresso Ventures, LLC, or any other party to take a position regarding the identity of the member of the IAC, which shall then remain subject to Court approval..~~

~~The IAC will have no formal decision-making authority and will serve solely as a resource to provide assistance to the Receiver with respect to her management of the securities remaining in the Receivership Estate. The Receiver may consult with the IAC or individual members of the IAC as appropriate. Members of the IAC will not be compensated for their service on the IAC.~~

~~If the Receiver and/or the SEC seek any future changes to this Distribution Plan, they shall meet and confer in advance with the IAC and Progresso Ventures, LLC at least two weeks prior to filing any motion in this Court seeking such changes.~~

## ~~IX.~~V. Proposed Plan Notice

Upon entry of an order preliminarily approving the Distribution Plan:

1. The Receiver will file the Distribution Plan and a notice of hearing for final approval of the Distribution Plan ("Plan Notice").

2. The Plan Notice will contain the principal elements of the Distribution Plan, an objection deadline, the hearing date, time and place, and the web address of where the complete Plan can be reviewed online. The Plan Notice will also offer interested parties the right to request a hard copy of the Plan by regular mail.

3. The Receiver will serve the Plan Notice on all Unsecured Creditors, Investors and parties in interest as follows:

   a. By ECF on those parties that have an account on the District Court's website;

   b. By email where the email address is known to be valid and current;

   c. By regular mail where an email address is not known or is known to be invalid.

4. The Receiver shall post the Plan Notice and the Distribution Plan on the Receiver's website at: http://www.diamondmccarthy.com/saddleriverreceiver.

5. The SEC Staff will also post a link to the Distribution Plan on www.sec.gov.

## ~~X.~~VI. Methods of Distribution

### A. Creation of Plan Fund to Pay Cash Claims in Classes 1, 2, 3 and 5

#### 1. Sale of Securities to Create Plan Fund

The Receiver shall sell securities to generate the Plan Fund as follows:

(a) Securities shall be sold to generate an amount of 30% of the gross amounts invested by the Investor Claimants in Successful Investments

(b) Any surplus securities for any of the Successful Investments shall be sold.

(c) Additional s~~S~~ecurities shall be sold to generate sufficient funds to pay any estimated ~~Administrative and~~ Priority Tax Claims generated from the sale of securities and the distribution of shares back to Investors and said sales proceeds shall be deposited in the Tax Holding Account.

(d) The Receiver shall sell securities as follows for the Successful Investments following a liquidity event for a given Successful Investment.

(e) The 30% to fund the Plan Fund shall be net of any brokerage fees paid in connection with the sale of the securities. In other words, the amount to be held in the Plan Fund following payment of brokerage fees shall equal 30% of the gross amount invested.

(f) The Receiver shall sell the securities in a manner consistent with state and federal corporate and securities laws. The Receiver anticipates that such distributions or sales shall be done in accordance with Section 5 of the Securities Act of 1933 ("Securities Act") or in accordance with exemptions from registration provided in the Rules promulgated by the Commission pursuant to the Securities Act.

If all of the remaining investments that are not Failed Investments ultimately become Successful Investments, the dollar value of securities to be sold to create the Plan Fund shall be $13,889,696 in the aggregate for the 30% figure. The dollar value of the surplus shares is presently unknown. The amount of any tax liability that may be generated is presently unknown and therefore the amount of securities to be sold to fund the Tax Holding Account is presently unknown. The breakdown by investment of the funds to be contributed to the Plan Fund from the sale of securities is set forth in Exhibit "15" attached hereto. The Plan Fund will be less if not all of the pre-IPO investments become Successful Investments.

**2. Priority of Payment of Claims from Plan Fund**

Claims shall be paid from the Plan Fund in the following priority:

Class 1: Administrative Claims shall be paid in full from the Plan Fund. The Administrative Cash Reserve shall retain sufficient funds and the Administrative Stock Reserve shall retain sufficient shares to pay projected Administrative Claims through the close of the Receivership Estate.

Class 2: Priority Claims shall be paid in full from the Tax Holding Account. The Administrative Cash Reserve shall retain sufficient funds and the Administrative Stock Reserve shall retain sufficient shares to pay projected Priority~~Administrative~~ Claims through the close of the Receivership Estate. If the Tax Holding Account ~~Plan Fund~~ is not sufficient to pay Class 2 claims in full, the Receiver shall sell additional securities to increase the Tax Holding Account~~Plan Fund~~ to an amount sufficient to pay the Class 2 claims in full.

Class 3: Unsecured Creditor Claims shall be paid from the Plan Fund. If the Plan Fund is insufficient to pay the Unsecured Creditor Claims in full, the Unsecured Creditor Claims shall be paid on a pro rata basis. The Receiver shall not be obligated to make any payment to the allowed Class 3 claims if there are not sufficient securities to liquidate to pay all Class 1 and 2 claims in full.~~.~~

Class 5: To the extent that there remain any surplus funds in the Plan Fund or the Tax Holding Account following payment in full of Class 1, 2 and 3 claims, the Receiver shall distribute the balance of the Plan Fund and the Tax Holding Account to the Class 5 claimants on a pro rata basis.

The Receiver shall endeavor to make distributions from the Plan Fund as soon as practicable following a liquidity event for a given investment. The Receiver anticipates holding a balance in the Tax Holding Account pending receipt of final tax clearance from the IRS at the end of the case and will distribute any excess funds after such clearance is received.

**3. Administrative Cash Reserve:**

The Receiver shall have the authority to retain a reserve from the Plan Fund and the Tax Holding Account to ensure that sufficient funds will be available to pay:

a. Class 1 and 2 claims in full through the close of the case;

b. Any and all estimated tax liability generated from the sale of securities to generate the Plan Fund, the Tax Holding Account, and in connection with the transfer of shares to Class 5 claimants;

c. The fees and costs to wind up the Receivership Estate; and

d. Any unanticipated costs of the Receivership Estate.

**4. Anna Bivona funds:**

The Disgorgement Funds obtained by the SEC from relief defendant Anne Bivona are not assets of the Receivership Estate and may be distributed or transferred at the SEC's discretion on receiving any necessary court approval.

**5. Final Distribution:**

Following the last liquidity event for the last Successful Investment, the expiration of any lockup period, and the distribution of the cash from the Plan Fund and the securities in connection with that particular Successful Investment as set forth herein, the Receiver shall prepare and file final tax returns and, upon receipt of final tax clearance, shall seek authority from the Court to make a final distribution of any funds remaining in the Plan Fund and the Tax Holding Account at that time.

**B. Distribution of Securities to Investor Claims**

1. Class 4 Investor Claims shall receive distributions following: (a) a liquidity event for a Successful Investment; (b) the expiration of any lockup period or contractual restrictions on transfer imposed by the issuer of the securities; (c) the sale of securities to create the Plan Fund and Tax Holding Account; (d) a determination of estimated Priority Claims generated from the anticipated distributions and the sale of securities to generate funds to pay the anticipated tax liability; (e) the sale of securities sufficient to generate funds sufficient to pay such estimated Priority Claims; and (f) approval by the Court of the Final Schedule of Proposed Stock Distributions for a particular Successful Investment.

2. If the Receivership Estate does not ultimately obtain securities for a Successful Investment, the Investor Claimants shall be treated as Class 5 Subordinated Claims.

3. To the extent that there is any shortfall in the number of shares to distribute for a particular Successful Investment, the number of shares distributed to investors shall be reduced on a pro rata basis and such distribution shall be deemed full satisfaction of the Investor Claims with respect to that particular Successful Investment.

4. The Receiver shall retain an Administrative Stock Reserve of shares from each of the Successful Investments to ensure that sufficient funds will be available to pay:

a. Class 1 and 2 claims in full through the close of the case;

b. Any and all tax liability generated from the sale of securities to generate the Plan Fund and the Tax Holding Account and in connection with the transfer of shares to Class 5 claimants;

c. The fees and costs to wind up the Receivership Estate; and

d. Any unanticipated costs of the Receivership Estate.

5. The Receiver may delay such distribution until such time as the tax liability for the liquidation of the shares has been established.

6. Each of the Final Schedules of Proposed Stock Distributions and distributions made to Class 4 Investor Claimants shall comply with all securities law requirements.

**C. Tax Treatment and Apportionment of Tax Liability**

1. The Receivership Estate shall be treated as a Qualified Settlement Fund ("QSF") effective as of the date of the commencement of the Receivership Estate, October 11, 2016.

2. The assets of the Receivership Entities became property of the QSF as of October 11, 2016.

3. The Receiver shall obtain a valuation of the assets of the Receivership Entities as of October 11, 2016.

4. The sale of securities to create the Plan Fund and the Tax Holding Account, and the transfer of securities to Investors in connection with the Class 4 distributions, shall be treated as taxable events if required by law.

5. The Receiver is authorized to sell securities and to retain monies in the Plan Fund and the Tax Holding Account to pay any and all tax liability generated from the sale and transfer of securities in connection with this Plan.

6. Any tax liability of the estate shall be paid through the sale of securities to generate sufficient cash in the Tax Holding Account ~~Plan Fund~~ to pay such tax liability. No distributions to Classes 3, 4, or 5 shall be paid until such time as the Receiver, in her discretion, determines that sufficient funds are available in the Tax Holding Account ~~Plan Fund~~ to pay all taxes in full.

## ~~XI.~~VII. Administrative Matters

### A. Jurisdiction of Court

This Court shall have sole and exclusive jurisdiction to interpret and enforce this Plan.

Allowed Claims shall be subject to the jurisdiction of the District Court for the Northern District of California.

### B. Reports to the Court and to Claimants

The Receiver shall file a written report with the Court no less than every 120 days regarding the status of efforts to implement this Distribution Plan. The Receiver shall post a copy of her written report, which may be part of the quarterly report, on the Receiver's website in order to provide notice to claimants.

### C. Adjustments and Amendments

To carry out the purposes of the Distribution Plan, the Receiver may make adjustments to the Distribution Plan, consistent with the purposes and intent of the Distribution Plan, as may be agreed upon between the Receiver and the Commission, subject to meet and confer requirements with counsel for the SRA Investor Group,~~the IAC~~ and Progresso Ventures LLC,~~,~~ and approved by the Court. The Court retains jurisdiction over this matter for the purpose of ruling on any such proposed amendments and for any and all other matters that may arise under or relate to the Distribution Plan.

### D. Possible Avoidance Actions and Retained Claims

All Causes of Action, including possible Avoidance Actions, are to be preserved by and for the Receivership Estate. The Receiver for the Receivership Estate expressly preserves such Causes of

Action for later adjudication, and nothing herein waives the right to bring such Causes of Action unless the Cause of Action has been settled in this Distribution Plan.

**E. Completion of Plan**

Provided that all of the investments have either had a liquidity event or have failed, the Receiver will complete the distributions required by the Plan within five years from date the Plan is approved by the Court, unless an application is filed with and approved by the Court to extend the time to complete the distributions.

If the Receiver or the SEC Staff determines that the Receiver has concluded her duties and obligations under the Receivership appointment orders issued by the Court, as may have been amended, either the Receiver or the SEC Staff may apply to the Court for an Order terminating the Receivership.

Any Order terminating the Receivership shall provide for the Receiver to file a final accounting providing schedules identifying: (i) all assets, their source and value; and (ii) all liabilities, the nature and amount of such claims.

The Receiver shall preserve all records and documents obtained during the Receivership until a date that is 1 year following the close of the Receivership.

To the extent that it is not expressly superseded by, or clearly contrary to, the provisions of this Distribution Plan, the Order Appointing the Receiver dated February 28, 2019 shall remain in full force and effect, unless superseded by an Amended Order Appointing Receiver.

Retention of jurisdiction: All disputes concerning the Plan and any issues or claims arising in or under the Plan shall be resolved by the Court in the Receivership Case.

DATED: December~~June 6~~, 2019

By: /s/ *Kathy Bazoian Phelps*
Kathy Bazoian Phelps, Successor Receiver